No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest association of business and professional organizations in the Nation; it has a direct membership of over 97,000 corporations, partnerships, proprietorships, and individuals, as well as over 4000 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents the interests of its members before the United States Congress, the Executive Branch, the federal regulatory agencies, and, increasingly, the courts.

Its appearances in litigation matters have included participation as *amicus curiae* in numerous cases before this Court.[1]

The Chamber undertakes to represent the concerns of enlightened business leadership, and thereby to promote the wider interests served by such leadership. Problems like the one presented in this case are of special interest in a time like the present, a time of transition and intense self-scrutiny by all Americans concerned with preserving the benefits of a free, competitive, expanding economy. Taking the position that the decision below disserves these shared goals, the Chamber submits also that the rule of this decision is not consonant with the terms and purposes of the National Labor Relations Act.

Decisions to withdraw or transfer resources from one facility or line of endeavor to another are uniquely the central burdens and prerogatives of management. They are determinations that call for speed, flexibility, often for secrecy. They are matters on which the collective bargaining process is unlikely to be useful, but likely to be obstructive or destructive. As the Labor Board itself has said, in a setting not materially distinguishable in our view from the one presented here (*see* pp.13-16, *infra*):

> [D]ecisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employement [*sic*], or other conditions of employment." Such managerial decisions oftimes require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations

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1 *E.g.*, *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, _____ U.S. _____, 100 S. Ct. 2844 (1980); *Consolidated Edison Co.* v. *Public Serv. Comm.*, _____ U.S. _____, 100 S. Ct. 2326 (1980); *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979) *Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965).

> are likely to be unfamiliar to the employees and their representatives. [*General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), *petition for review denied sub nom. International Union, UAW* v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972).]

If the National Labor Relations Act required bargaining procedures destructive of sound managerial leadership without corresponding benefits to labor or some wider public, the remedy would presumably lie with Congress. But it is the position of this *amicus* that the rule enforced by the majority below is not soundly to be gleaned from the terms of § 8(a)(5) or the good sense of labor-management policy with which the interpretation of this statute must be approached.

The thought is more broadly expressed in words we quote from Justice Stewart's concurrence in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 225-26 (1964):

> I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. *But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.* [Emphasis added.]

SUMMARY OF ARGUMENT

I. Prior decisions of this Court, if not squarely controlling, lend strong support to petitioner's position. Narrowly confined to a case of subcontracting, where employees represented by the complaining union were displaced by other employees doing the same work in the same place, *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964), tends in its implications to preserve a partial closing for independent managerial discretion. *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), is more powerfully supportive of petitioner. There, the Court ruled that an employer closing one of its plants, even when acting from antiunion animus, could not be held guilty of an unfair labor practice under § 8(a)(3) of the Act, and required to reinstate discharged employees with back pay, unless the closing was accomplished with a motive and purpose to chill unionism in remaining plants. It should follow *a fortiori* that an employer, like petitioner here, acting only for legitimate business reasons and without antiunion motivation, is not subject to an order under § 8(a)(5) reinstating employees and giving them back pay because the partial closing was not preceded (any more or less than the closing in *Darlington*) by bargaining with the union.

The Board, drawing the lines more aptly then, held in *Darlington* that § 8(a)(5), as well as § 8(a)(3), had been violated in that case because there had been antiunion animus. But it did not attempt the more extreme position it presents now. This later position is not consonant with the National Labor Relations Act as construed by this Court in light of controlling policies dividing the sphere of independent managerial judgment from the broad area in which collective bargaining is mandatory.

II. The Board's extended position is self-contradictory and fails to supply rational guidance for those regulated. The Board distinguishes partial closings, where it holds bargaining compulsory, from partial *sales* of a business, for which it does

not require bargaining. Pursuing this distinction, it has held that an employer violated § 8(a)(5) when it closed a facility without bargaining after trying in vain, in the face of steady losses, to sell the facility. The distinction reflects no rational difference in law or policy; it reflects rather the Board's failure to recognize with clarity that both types of management decision involve substantially identical forms of managerial judgment that are not suitably subject to mandatory bargaining.

The Courts of Appeals, including the court below, have uniformly declined to uphold the Board's position. The court below enforced the Board's order on a rationale of its own, differing from the Board's. The Third Circuit had earlier followed a comparable course, but on a still different theory. These recent determinations, departing from a majority of the Circuits that have considered the problem, are questionable under the principle of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that an administrative decision should stand or fall upon the agency's stated grounds, not be upheld on different grounds evolved by the court.

Apart from that objection, the contrariety of views among the Board's own decisions, and as between the Board and the two Circuits tending to accept its decisions, is itself reflective of a misconceived body of doctrine. The fundamental defect is the failure to follow the lines of law and policy demonstrating that partial shutdowns or terminations of a business are not appropriate subjects for compulsory bargaining, but are properly within the domain lying "at the core of entrepreneurial control." *Fibreboard*, *supra*, at 223 (concurring opinion of Justice Stewart, joined by Justices Douglas and Harlan).

ARGUMENT

I.

PRIOR DECISIONS OF THIS COURT, AS SOUNDLY UNDERSTOOD AND FOLLOWED IN A MAJORITY OF THE CIRCUITS, SUPPORT AN EMPLOYER'S FREEDOM TO CLOSE A DISCRETE PLANT OR FACILITY WITHOUT FIRST BARGAINING WITH THE UNION ABOUT THE DECISION TO DO SO

While the exact question in this case is an open one in this Court, the decisions in *Fibreboard* and *Darlington*, *supra*, embody principles favoring petitioner's position—that management, responsible for allocating the capital and basic resources of the enterprise, is entitled (as well as being in significant respects *obligated*) to decide without collective bargaining when a plant or facility comprising less than all of the business should be closed down in the exercise of a legitimate business judgment. The "legitimacy" of the judgment thus identified includes, importantly for present purposes, that it rests upon genuine economic concerns and is not motivated at all by hostility to a union. The absence of antiunion animus is an undisputed circumstance in the present case.

Given this key circumstance, the decisions in *Fibreboard* and *Darlington* supply important guidelines toward a sound resolution of the problem now presented. *Fibreboard*, sharply limiting a far more sweeping decision by the Board, found a violation of the duty to bargain on the closely confined facts of a case in which the employer, by subcontracting, transferred a portion of its work from its own employees, represented by a union, to the employees of another employer. In other words, there was in effect a *substitution* displacing the workers represented by the complaining union. *Darlington* held that an employer could close one of its plants entirely, eliminating the jobs of all those represented by the union, without committing

the unfair labor practice proscribed by either § 8(a)(3)[2] or § 8(a)(1)[3] of the NLRA.

While the relationship is not one of pure logic or mathematics, the instant case would seem to come much closer to the result in *Darlington* than to that in *Fibreboard*. Indeed, in the vital and uncontroverted fact that there was no element of hositility against the union, this case is far stronger for the employer than *Darlington*. It should emerge, upon revisiting that decision, that there would be considerable incongruity in holding that discharges of all the employees upon the closing of a facility cannot be held unlawful and reversed under § 8(a)(3), but that such a decision to close the plant should turn out after all to be an unfair labor practice under § 8(a)(5), leading to substantial back pay liability to the employees who lost their jobs. The suggested incongruity is more than a concern for symmetry in the law. It reflects the fundamental point that *Darlington* marks boundaries in which management's unilateral authority must be deemed commensurate with management's unique responsibility to conduct the enterprise, direct investment, allocate capital, decide on directions of growth and retrenchment—in a word, to manage the business. The kind of partial termination involved in this case is well within those boundaries.

A. *Fibreboard* Dealt Narrowly with a Clearly Distinguishable Case of Substituting Employees Continuing the Same Work by Contracting Out Rather than Closing or Terminating Part of the Enterprise

The "carefully limited decision in Fibreboard" (Kearse, J., concurring and dissenting below, App. A at 17) is argued at

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2 "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1973).

3 "It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1973).

length in petitioner's brief. For reasons there developed, the opinions of Chief Justice Warren and Justice Stewart (joined by Justices Douglas and Harlan) are not thought by anyone to control decision here. As petitioner shows, however, the opinions read together, as they must be, defend robustly a substantial domain lying "at the core of entrepreneurial control." 379 U.S. at 223 (Stewart, J., concurring).

This *amicus* joins in, without repeating, petitioner's submissions on *Fibreboard*. We turn to a fuller presentation concerning the *Darlington* case, which is, in our view, powerfully supportive of petitioner's position.

B. The Premises and Principles of This Court's Decision in *Textile Workers Union* v. *Darlington Manufacturing Co.* Show That a Partial Closing, Not Motivated by Anti-union Animus, Cannot Constitute an Unfair Labor Practice

In *Textile Workers Union* v. *Darlington Manufacturing Co.*, 380 U.S. 263 (1965), this Court held that an employer, though motivated by antiunion animus, does not violate § 8(a)(3) of the Labor Act if (1) it closes its *entire business* for any reason whatever, or (2) it closes one of several plants, provided in this latter case the employer is not "motivated by a purpose to chill unionism in any of the remaining plants . . . and . . . may reasonably have foreseen that such closing would likely have that effect." *Id.* at 275.

Strictly speaking, the case dealt with § 8(a)(3), not § 8(a)(5), which is involved here. The underlying premises, however, and the logic of the decision leave no tenable ground for holding that an employer, without any antiunion animus, violates § 8(a)(5) by a partial closing that has not been a subject of advance bargaining with the union.

The *Darlington* opinion, written by Justice Harlan for a unanimous Court,[4] started from the proposition that a decision to shut down all or part of a business is plainly within the

4 Justices Stewart and Goldberg did not participate. *Id.* at 277.

realm of "management prerogative." *Id.* at 269, 276. Thus, in speaking of *total* closings, the Court characterized actions of this nature as "peculiarly matters of management prerogative . . . ." *Id.* at 269. The language was not significantly dissimilar when the Court talked of the essential findings required before a *partial closing* could be deemed an unfair labor practice. Except for the special circumstances of discriminatory motive and purpose that could ground a finding of an unfair labor practice, the Court noted that a decision to shut down part of the enterprise is among "otherwise legitimate employer prerogatives. . . ." *Id.* at 276.

The word "prerogative" aptly describes subjects for management's determination outside the scope of mandatory bargaining. *See, e.g., Fibreboard, supra*, 379 U.S. at 226 (Stewart, J., concurring); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 549 (1964); *NLRB* v. *International Harvester Co.*, 618 F.2d 85, 86 (9th Cir. 1980); *NLRB* v. *Adams Dairy, Inc.*, 322 F.2d 553, 556 (8th Cir. 1963), *vacated*, 379 U.S. 644 (1965); *Summit Tooling Co.*, 195 N.L.R.B. 479, 480 (1972), *enforced*, 71 Lab. Cas. ¶ 13,613 (7th Cir. 1973); *Ozark Trailers, Inc.*, 161 N.L.R.B. 561, 569 (1966); Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 393, 421, 430, 431, 432 (1950). It is not to be supposed that the word was employed by this Court, in a case where § 8(a)(5) had actually been implicated, *see* 380 U.S. at 267 n.5, without intending this clear and apposite meaning. But we proceed beyond the significant word to recall the course of this Court's reasoning and its powerful significance for the present case.

The closing of the mill in *Darlington*, accomplished with animosity towards the union as a motivating cause, entailed inescapably a "failure of the Company to bargain with the union with respect to the tenure of employment of the employees" who lost their jobs as a result of the shutdown. The quoted language, fairly describing the events, is from the dissent in the Fourth Circuit in *Darlington Manufacturing Co.* v. *NLRB*, 325 F.2d 682, 694 (4th Cir. 1963) (Bell, J., dissent-

ing). Had that dissent prevailed, the Board would have been upheld in its finding of a violation of § 8(a)(5) as well as § 8(a)(3). When, however, the Fourth Circuit's majority view was sustained, the two species of violations fell together. The hostile action in *Darlington* in closing the plant, aimed against the union, was not a violation of § 8(a)(3) absent the further antiunion effects elsewhere that might alter that conclusion under this Court's decision. It was by the same token no violation of the duty to bargain under § 8(a)(5). The latter conclusion should follow *a fortiori* in a case like the present one, where the closing is not prompted by antiunion animus but solely by legitimate business considerations.

To restate this thought, which seems important, in terms of this Court's decision in *Darlington*: Even where a plant closing is triggered by hostility to a union, the discharges thereby accomplished are not violative of § 8(a)(3), absent the broader antiunion motive and purpose *Darlington* defined. This undercut in *Darlington* a finding of a § 8(a)(5) violation "in part based on the determination that the plant closing was an unfair labor practice" under § 8(a)(3). 380 U.S. at 267 n.5. And the Board's position based upon that premise was not accompanied by any "argument . . . that § 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." *Id.*

In the position it now espouses, however, the Board makes the argument it did not attempt in *Darlington*, and seeks in practical effect to nullify the "prerogative" vouchsafed to employers under that decision. This is not to suggest, obviously, any attempt at stealth or evasion. It is merely to make plain the consequences of the Board's view and to urge that such consequences would accomplish essentially the results *Darlington* should bar—the reversal of the employer's decision to close and reinstatement of the employees with back pay. If mere logic, on a strict sorting of premises, would countenance such a result, it is difficult to say the same for a rational scheme of law.

At least three Circuits—the Fourth, Eighth, and Tenth—have so held, somewhat more briskly, on the basis of this Court's decision in *Darlington*. *NLRB* v. *Edward M. Rude Carrier Corp.*, 79 Lab. Cas. ¶ 11,615 at 21,635-36, *reported without published opinion*, 541 F.2d 277 (4th Cir. 1976); *Morrison Cafeterias Consolidated, Inc.* v. *NLRB*, 431 F.2d 254, 257-58 (8th Cir. 1970); *NLRB* v. *Thompson Transport Co.*, 406 F.2d 698, 703 (10th Cir. 1969); *NLRB* v. *William J. Burns International Detective Agency, Inc.*, 346 F.2d 897, 902 (8th Cir. 1965). Those decisions interpret accurately the import of what this Court held. Unless *Darlington* itself, and its basic conception of management's authority to effect plant closings, is to be overturned, the Board's position herein should be rejected.

II.

THE BOARD'S INCONSISTENT POSITIONS, AND THE DIVERGENT VIEWS OF THE SECOND AND THIRD CIRCUITS, ARE UNWORKABLE AND UNPREDICTABLE FETTERS ON MANAGERIAL DISCRETION

As reflected in the preceding discussion, until the decision in *Brockway Motor Trucks* v. *NLRB*, 582 F.2d 720 (3d Cir. 1978),[5] and that of the Second Circuit here under review, the Courts of Appeals had uniformly rejected the Board's view that an employer, acting for business reasons and without antiunion motivation, commits an unfair labor practice by failing to bargain respecting a decision to close a plant or terminate an operation. *See* cases in preceding paragraph and others treated in petitioner's brief.[6]

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5 The Board's decision on the Third Circuit's remand, 251 N.L.R.B. No. 23 (1980), is before that Court on petition for review, No. 80-2327.

6 Until their recent departures, the Second and Third Circuits had appeared to be aligned with the others. See *NLRB* v. *Royal Plating & Polishing Co.*, 350 F.2d 191, 195-96 (3d Cir. 1965); *NLRB* v. *Rapid Bindery, Inc.*, 293 F.2d 170, 172 (2d Cir. 1961). But the majorities, in both the instant case and in *Brockway*, distinguished those prior cases.

(footnote continued on next page)

Adhering to its view, the Board has continued to apply a "*per se*" rule (*see* App. A at 10) imposing a duty to bargain in cases of *closings* or *shutdowns* but finding no duty to bargain in what it has deemed distinguishable cases where the employer *sold* a plant or ceased entirely to perform a particular type of business activity.[7] The result, we believe, is a set of disorderly and unprincipled administrative directives in which there is not the requisite guidance for those regulated. The confusion is not relieved, it is increased, when the courts proceed, as have the Second and Third Circuits, to reject the agency's rationale and nevertheless to sustain the agency's position on rules fashioned by them to govern labor-management relations.

A. The Board's Decisions Reach Differing Results On Distinctions That Should Make No Difference

In its main case on this subject, *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966), the Board undertook to follow *Fibreboard,* reasoning along the way (*see* pp. 568-69) that the requirement of bargaining before contracting out applies *a fortiori* to a case in which an employer closes down one of its

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The Court of Appeals here indicated that the rationale of *Rapid Bindery* did not survive this Court's *Fibreboard* decision (App. A at 9 n.4). The Third Circuit in *Brockway* viewed its earlier decision in *Royal Plating* as applicable only to instances where economic necessity forces termination of a failing business, and not as relieving employers of bargaining obligations over decisions to close prompted by less severe economic pressures. *Brockway Motor Trucks* v. *NLRB*, *supra*, 582 F.2d at 732. Judge Rosenn, dissenting, said that the Court's decision "depart[ed] from the principles of [the] court's landmark decision in *NLRB* v. *Royal Plating & Polishing Co.*," 582 F.2d at 741. The Court in *Royal Plating*, Judge Rosenn said, "took great pains to distinguish the reasoning of [*Fibreboard*]." He could find nothing in the earlier opinion "limit[ing] the rule enunciated to . . . [the] narrow case" of economic necessity. *Id.* at 743.

7 The Board also excepts some rare cases in which the circumstances prompting the closing are entirely beyond the control of either the union or the employer. *See Brooks-Scanlon, Inc.*, 246 N.L.R.B. No. 76 (1979) (no duty to bargain over closing of sawmill because of insufficient supply of timber). Other situations treated differently—and, in our view, irreconcilably—are mentioned below, pp. 15-16 n.8.

plants. For reasons elaborated by petitioner, and elsewhere herein, we believe the Board misread *Fibreboard* and, perhaps more clearly, *Darlington*. At this juncture, we note that from *Ozark Trailers* itself, and more clearly from the Board decisions following it, there has emerged what the court below and others have fairly described as a "*per se* rule"—"imposing a duty to bargain whenever an employer closes part of its business" (App. A at 10). *See Brockway*, 582 F.2d at 732.

In what might have seemed at first to be a retreat, but is now entrenched as an anomaly, the Board, in *General Motors Corp.*, 191 N.L.R.B. 951 (1971), *petition for review denied sub nom. International Union, UAW* v. *NLRB*, 470 F.2d 422 (D.C. Cir. 1972), held that an employer's decision to *sell* a portion of its enterprise is not a mandatory subject of bargaining. The explanation for that result is quoted here at length in the view that it cannot subsist with the position of the Board (and the court below) in the present case:

> Consistent with the expressly restricted scope of *Fibreboard*, the courts have sustained the Board's position in subcontracting cases, but rejected Board decisions requiring bargaining over more elemental management decisions, such as plant closings and plant removals.
>
> It appears that the Board has not dealt definitively with the specific question whether the Act imposes a duty to bargain over a decision to sell an employing enterprise. We believe, however, that this issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within "rates of pay, wages, hours of employement [*sic*], or other conditions of employment." Such managerial decisions ofttimes require secrecy as well as the freedom to act quickly and decisively. They also

> involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives.
>
> We therefore disagree with the Trial Examiner here, who found that "[i]n the instant case Respondent made a managerial decision but hardly one lying at the core of the entrepreneurial control." A decision to withdraw capital from a company-operated facility and relinquish operating control to an independent dealership is very much "at the core of entrepreneurial control." [*Id.* at 951-52 (emphasis in original).]

A scholar reading that account could understandably say that the Board's *General Motors* decision "appear[ed] to reject every premise of [the] decision in *Ozark Trailers*." R. GORMAN, LABOR LAW 520 (1976). Others, including the Board's own administrative law judges, to say nothing of employers and unions, might have reached a similar conclusion. But, as the present proceeding reflects, the Board has attempted to preserve the *per se* rule of *Ozark Trailers* along with *General Motors*.

The consequent bewilderment is well illustrated by the *Brockway* case, especially in the Board's proceedings after the remand from the Third Circuit. An experienced Administrative Law Judge, after hearing the evidence declared relevant by the Court of Appeals (*see* p. 17, *infra*), absolved Brockway of the § 8(a)(5) charge. He wrote, *inter alia* (251 N.L.R.B. No. 23, slip op. of ALJ decision at 16):

> [T]he Board has, since *Ozark Trailers*, continued to rely on that decision as the touchstone for imposing upon an employer the duty to bargain with an incumbent union over an economically motivated determination to close a plant. However, the conclusion reached herein that Brockway did not unlawfully shirk that duty does not appear to be entirely at war with the Board's decisional trend in this area. In its initial decision in this proceeding, the Board noted that there was no evidential showing that Respond-

> ent's decision to close the Philadelphia branch "involved such a 'significant investment or withdrawal of capital' as to 'affect the scope and direction of the enterprise,' " citing to its decision in *General Motors Corp.* By this notation, it can only be assumed that *General Motors Corp.* is still alive and well and that, if such a showing had been made, the ultimate result herein might have been different.
>
> In short, I am convinced and conclude that Brockway's economic interests in this case which impelled the sudden closure of the Philadelphia branch were of such magnitude and immediacy as to make unfair the imposition of a duty to bargain with the Union over its decision to shut down the facility. Accordingly, I shall recommend that the complaint herein be dismissed in its entirety.

But the Board rejected that recommendation. Without mentioning *General Motors*, the Board concluded that Brockway had violated § 8(a)(5) when it closed, but did not sell, a Philadelphia branch without bargaining. *Id.*, slip op. at 10. The result verges on the ludicrous when we attend to the fact that Brockway *had tried in vain to sell* the branch in question; had maintained the unsalable operation through a long course of heavy losses; and effected this closing as one of a series of similar shutdowns terminating an entire division of the enterprise. *Id.*, slip op. at 6-7, slip op. of ALJ decision at 9-12.

Other incongruities in the Board's relevant jurisprudence are assigned here to a long footnote.[8] The point, sufficiently

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8 *Summit Tooling Co.*, 195 N.L.R.B. 479 (1972), *enforced*, 79 Lab. Cas. ¶ 13,613 (7th Cir. 1973), could have seemed to continue the withdrawal suggested by *General Motors*. The Board there found no duty to bargain over a decision to close, *without selling*, a manufacturing plant. So held even upon a finding that "the closing was discriminatorily motivated." *Id.* at 479. The reason given was that the employer, though staying in business elsewhere, was giving up the manufacturing "part of the business" and would not be using elsewhere the skills of the employees losing their jobs. We would submit

(footnote continued on next page)

illustrated, is that the Board has led itself, and those it regulates, into a maze. The *Ozark Trailers* rule, the propriety of which is the subject most properly before this Court (*see* p. 17, *infra*), is demonstrated to be unacceptable, even to the Board. The distinction between a sale and a closing where a sale is not or cannot be made is a distinction that can make no rational difference for the purposes at hand. A rule so misconceived, from an agency commissioned to give expert direction, should not be held acceptable.

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the result is not consistent with *Ozark Trailers* and no less clearly with the principles of *Darlington* reviewed earlier.

A case of the same kind, subject to the same criticism, is *Stanley Oil Co.*, 213 N.L.R.B. 219 (1974).

The weaknesses of a rule turning on the manner in which the employer disposes of the facility are even more apparent in the Board's recent decision in *National Car Rental System, Inc.*, 252 N.L.R.B. No. 27 (1980). There, the Board held that an operator of car and truck rental facilities was not required to bargain over its decision to sublet one such facility, assign some of its lease accounts, and sell some of its trucks to another operator. The employer remained in business locally, transferring the remainder of its assets from the subleased facility to a new one at a nearby location, to which it refused discriminatorily to consider transferring any of the union represented employees who had previously worked at the subleased facility. The Board, relying on *General Motors*, found this to be a decision involving " 'a significant investment or withdrawal of capital' " and "affecting the 'scope and ultimate direction of an enterprise' ", 252 N.L.R.B. No. 27, slip op. at 15—a surprising statement with respect to a business that has hundreds of outlets throughout the country. The plain import of the facts—that this reallocation of capital was of a decidedly smaller relative scale than that in *Brockway* or *General Motors*—was submerged, while the form of the transaction was given decisive weight. The presence of a sale—even if what is sold is only one element of the transaction—appears to be the Board's talisman for avoiding application of the *Ozark Trailers* rule. The realities of both management needs and labor's concerns are erased along the way.

Reviewing the course of these decisions, Professor Gorman has said: "These distinctions are quite fine, indeed one might say barely perceptible, and have created difficulties for administrative law judges trying to apply Board precedent, divisions within the Board membership itself, and uncertainty for employers." R. GORMAN, LABOR LAW 519 (1976).

B. The Divergent "Presumptions" of the Second and Third Circuits Tend to Aggravate Rather Than Repair the Discordant and Unpredictable Course of Board Decisions

Both the Third and the Second Circuits, while prepared to uphold results reached by the Board via its *Ozark Trailers* rationale, have explicitly rejected the rationale. The Third Circuit in 1978 adopted a "presumption" and a balancing test under which a partial closing is mandatorily bargainable unless the employer shows that its "interests . . . [are] in fact of a magnitude and immediacy that would make unacceptable and unfair the imposition of a duty to bargain." *Brockway, supra*, 582 F.2d at 739.[9] The Second Circuit also disagreed with the Board, adopting a presumption like the Third Circuit's, but then disagreeing with the latter Court as well, ruling that its presumption may be rebutted "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain" in a particular case. (App. A at 12.)

Both Courts would seem to have departed from the settled principle "that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). The resulting confusion, within as well as between Circuits, evidences again the solid doctrinal basis on which *Chenery* rested. The principle there stated enforces an important division of functions as between courts and agencies. When the lines are breached and blurred, as they now are in the present context, the needs for direction and predictability of those subject to administrative regulation are seriously disserved.

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9 The *Brockway* court refused to enforce the Board's order because the record did not reveal the economic circumstances that prompted the closing, thus frustrating the task of applying the balancing test. But the Third Circuit later applied the *Brockway* test to enforce a Board order premised expressly on *Ozark Trailers* in *Electrical Products Div. of Midland-Ross Corp.* v. *NLRB*, 617 F.2d 977, 982-83 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3249 (No. 80-67, Oct. 6, 1980), *enforcing* 239 N.L.R.B. 323 (1978).

It is a nice question, for example, what the law on this subject actually is in the Third Circuit. The Board, taking the remand, accepted as the "law of this case" (251 N.L.R.B. No. 23, slip op. at 13), the Court's presumption and balancing test. The quoted expression appears to mean only what it says—that the Third Circuit's rule will govern only this (*Brockway*) case. This is in itself a slightly tense and awkward conception for a regulatory regime embracing three industrial states.[10]

A question not less difficult concerns the effective meaning, if any, of the differences between the Board's and the Court's rule. We have mentioned the perplexity and the wrong guess experienced by an able ALJ in coping with this situation, pp. 14-15, *supra*. The Board itself took the Circuit's balancing test, rejected the ALJ's handling of that test on an evidentiary record, and substituted speculation adverse to the employer as grounds for finding again an unlawful failure to bargain. The ALJ found from this record that "pressing economic urgency [had] impelled the decision to close" and that collective bargaining "could not have reasonably been expected to reverse or forestall" the decision. 251 N.L.R.B. No. 23, slip op. of ALJ decision at 15. The Board saw no "need for 'immediate action'," and opined that there would have been "room for productive bargaining . . . which at the very least could have resulted in a deferral of the timing of the closing." *Id.*, slip op. at 10-11. It is difficult in this light to imagine a case in which an employer could overcome the Third Circuit's presumption of mandatory bargainability. *See* Comment, *In a Partial Closing, The Interests of the Parties Must Be Balanced to Determine Whether the Closing is a Mandatory Subject of Bargaining*—Brockway Motor Trucks, Inc. v. NLRB, 582 F.2d 720 (3d Cir. 1978), 47 GEO. WASH. L. REV. 679, 697 (1979) (*Brockway* approach "so uncertain in its application that it renders any exception to the duty to bargain largely illusory").

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10 The Third Circuit Court of Appeals has commented, without pleasure, upon the Board's adherence to positions rejected in judicial review proceedings. *See Allegheny Gen. Hospital* v. *NLRB*, 608 F.2d 965, 966, 970 (3d Cir. 1979).

Somewhat similarly, the Second Circuit administered its differently limited presumption to defeat the employer's position on the basis of what the union "might have" done if the employer had bargained about the decision to leave Greenpark (App. A at 14). Again, the presumption is so impregnable that it may be doubted whether the stated possibility of rebuttal is real.[11] The absence of any opportunity to overcome the presumption (note 11, *supra*) may be a loss in form only. The rule of *Ozark Trailers*, said to be unacceptable in the court below, may have prevailed after all.

That *per se* rule is snarled in the objections and self-contradictions reviewed above. It should be rejected by this Court, as it has been by every court that has considered it.

In any event, whatever the rule of decision below is thought to be, it enforces an unrealistic and unwarranted restriction on effective decision-making that is clearly within the ambit of management's proper discretion. At least where there is, as here, no motivation hostile to the union, the requirement to bargain before deciding to close a portion of the business is not fairly found in the statute or in a sound sense of the statutory policy governing labor-management relations.

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11 Perhaps adding to the doubt, the court below did not bother to remand, as had the Third Circuit, for consideration by the Board in light of the new presumption. The employer, which had tried the case and had it decided under the Board's supposedly different regime of *Ozark Trailers*, was said by the Court to have "offered no evidence to rebut the presumption arising from the literal application of the statute" (App. A at 13).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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February, 1981